STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	**1998 OAL Determination No. 39**
Request for Regulatory	)	
Determination filed by DANA	)	**[Docket No. 96-006]**
K. FERRELL concerning the	)	
methods used by the DIVISION	)	**November 25, 1998**
OF LABOR STANDARDS	)	
ENFORCEMENT for (1)	)	**Determination Pursuant to**
Calculating Suspected Wage	)	**Government Code Section 11340.5;**
Violations and (2)	)	**Title 1, California Code of**
Determining Labor	)	**Regulations,**
Violations	)	**Chapter 1, Article 3**
_____	)	

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
JULIA CLINE NEWCOMB, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether (1) the Department of Labor Standards Enforcement, through its investigator, issued a notice to withhold payment for an amount greater than that supported by the evidence pursuant to an unwritten department policy, and whether (2) the selection of evidence relied upon to calculate that amount reflects an unwritten department policy. The facts presented in the record are inconclusive as to whether either of the challenged practices were policies of the Department of Labor Standards Enforcement ("DLSE").

For this reason, the Office of Administrative Law ("OAL") will analyze the practices under alternative views. If the practice of calculating the amount of payment to be withheld was a policy of the DLSE, then it constituted a "regulation" which is without legal effect unless adopted pursuant to the Administrative Procedure Act ("APA.") If the selection of documents relied upon by the investigator in making the decision to withhold payment on the contract was made pursuant to a policy of the DLSE, then it constituted a "regulation" which is invalid unless adopted pursuant to the APA. If, as the DLSE contends, the challenged practices did not reflect department policy, but the misunderstanding of a department employee, then the policies would not constitute "regulations" within the meaning of the APA.

ISSUE

OAL has been requested to determine[1], whether either (1) the method of calculating suspected wage violations, or (2) the method of selecting evidence in investigations of labor violations, constituted a "regulation" required to be adopted pursuant to the Administrative Procedure Act.[2],[3]

ANALYSIS

I. BACKGROUND

A. The State Agency and Rulemaking Authority

Existing law regulates the awarding of "public works" contracts and the working conditions of persons employed on public works.[4] The prevailing wage law governs wages and other conditions of employment on "public works." Public works contracts awarded to private contractors must include stipulations requiring the contractors and subcontractors to pay their employees no less than the applicable prevailing wage rates, as determined by the Director of the Department of Industrial Relations ("Director"). [5]

The Labor Code provides penalties for contractors and subcontractors who are found to have violated the public works law or prevailing wage requirements with the intent to defraud.[6]

The Division of Labor Standards Enforcement is a division of the California Department of Industrial Relations ("Department"). It was created in 1976 by the

enactment of Labor Code sections 82 and 83.[7] DLSE relies upon the Bureau of Field Enforcement ("BOFE") to investigate suspected violations of prevailing wage requirements. The California Labor Commissioner is Chief of the Division of Labor Standards and Enforcement.[8]

DLSE is responsible for enforcing various provisions of the California Labor Code, including those provisions involving wages, hours, and working conditions.[9] It is also responsible for resolving various claims for wages and benefits.[10]

BOFE is responsible for conducting investigations to enforce various minimum labor standards, which include the prevailing wage laws.[11]

The Director is the chief officer of the Department.[12] The Director's statutory authority is broad:

> "The director shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department, except as otherwise expressly provided by this code." [13]

The Director is explicitly authorized to make rules. Labor Code section 55 provides in part:

> "[T]he director may, in accordance with the provisions of [the Administrative Procedure Act], make rules and regulations that are reasonably necessary to carry out the provisions of this chapter and to effectuate its purposes."

B. This Request for Determination

This request for determination was submitted by Dana K. Ferrell, President of West Coast General Corporation. The requester asks for a regulatory determination concerning practices of the BOFE investigation unit used during an investigation of prevailing wage compliance respecting work performed by his company.

On August 17, 1990, West Coast General Corporation ("W.C.G.") contracted with the County of San Diego to build Sweetwater Regional Park.

On March 12, 1992, Investigator Juan Garza of the BOFE issued a "notice to withhold" and a "notice of wages owed" on the above project in the amount of $22, 768.60. That amount was reduced by $2,653.70 on January 5, 1993 to $20,114.88.

In reliance on the testimony of the investigator, the requester alleged it was the normal practice of the BOFE: (1) to calculate the amount of wages due, based on suspected wage violations, and then (2) to add 20 to 25 percent more to the amount to be withheld in case other violations surfaced. The requester asserted:

> "The purpose of this tactic is to withhold as much money as possible from the [c]ontractor and then increase that by 20 to 25 percent, imposing such a hardship on the [c]ontractor that he is forced to negotiate a settlement just to obtain a portion of the monies wrongfully withheld."[14]

The matter went to litigation, where the investigator was deposed under oath. The DLSE represents that "[t]he pending litigation was settled shortly thereafter, with Mr. Ferrell agreeing to pay an amount in excess of all the unpaid wages claimed due."[15]

On August 28, 1998, OAL published a summary of this request for determination in the California Regulatory Notice Register,[16] along with a notice inviting public comment.

On October 23, 1998 the DLSE responded to the request. The DLSE contends that the request for regulatory determination misstates existing practices, and therefore, the practices are not policies or "regulations." DLSE also contends that "the 'method of calculating suspected wage violations' is specifically set forth by statute, not regulation." Therefore, DLSE argues, the practice it employs restates existing law and is exempt from the APA.

II. DISCUSSION

A. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF INDUSTRIAL RELATIONS AND THE DLSE?

For purposes of the APA, Government Code section 11000 defines the term "state agency"as follows:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, *board*, and commission." [Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[17] The DLSE is in neither the judicial nor legislative branch of state government.[18] Clearly, the DLSE is a "state agency" within the meaning of the APA.

The Director of the Department of Industrial Relations has the authority to prescribe all rules and regulations necessary to enforce prevailing wage laws and requirements for public works.[19] Although Labor Code section 98.8[20] authorizes the Labor Commissioner to promulgate rules and regulations without specific reference to the requirements of the APA, the California Supreme Court has held the above quoted statutes apply the requirements of the APA to regulations and rules of the DLSE.[21]

> "The DLSE's primary function is enforcement, not rulemaking. (Labor Code sections 61, 95, 98-98.7, 1193.5.) Nevertheless, recognizing that enforcement requires some interpretation, and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary 'regulations and rules of practice and procedure.' (Labor Code section 98.8.)"[22]

Moreover, Labor Code section 1777.1, subdivision (e), which provides for debarment of offending contractors or subcontractors who violate the provisions of the public works law, "with intent to defraud," requires the Labor Commissioner to ". . . promulgate rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties."

B. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

In part, Government Code section 11342, subdivision (g), defines "regulation"as follows:

"'Regulation' means every rule, regulation, *order, or standard of general application* or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." (Emphasis added.)

Government Code Section 11340.5, subdivision (a), provides as follows:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, *instruction, order, standard of general application, or other rule*, which is a 'regulation' as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . ." (Emphasis added.)

In *Tidewater Marine Western, Inc. v. Bradshaw*[23] the California Supreme Court upheld OAL's two-part test, with specified exceptions not pertinent here, as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g). This test previously had been approved by the Court of Appeal in *Grier v. Kizer,* which provided:[24], [25]

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, OAL must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra,* 22 Cal.3d at p. 204, 149 Cal.Rptr. l, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[26]

The Court in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* [27] established that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

". . . [T]he . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .*" (Emphasis added.)[28]

The fact that DLSE denies the alleged practice of overestimating, by contending "that simply has never been the policy, written or unwritten, of the Division" is not dispositive whether the practice is a "regulation." Similarly, the fact that DLSE contends it merely follows existing law without interpretation, is not dispositive whether the practice is a "regulation." The alleged practices must be considered in light of the two-part analysis described in *Grier*, above.

1. First, is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

For an agency policy to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.[29]

With regard to the allegation that the DLSE had a policy to increase the estimated amount of back wages owed by twenty to twenty-five percent, the investigator testified that he was advised it was a general practice of the deputies, and that it was his normal practice. Further, the investigator testified he received information about this practice during training.[30]

In response, DLSE maintains:

> "[T]he fact of the matter is that the BOFE deputy was either misinformed as to the existence of any agency policy or misunderstood the directions of his supervisor as to the amount to be withheld in a particular case. No 'excess' estimate of wages or penalties is called for by any policy of DLSE. Such a policy does not exist and never has existed in this agency. . . .the only amounts that are to be included in a notice to withhold are the exact amount of calculated prevailing wage underpayments, and the exact amount of calculated penalties, *and that any excess withholdings are improper*. Indeed, this principle has been repeatedly emphasized to BOFE investigators in staff training sessions."[31]

Thus, the evidence is divided and conflicting as to the existence of the policy at all. However, for the sake of this analysis, if the policy were to exist, it would be intended to apply in all investigations of underpayment of prevailing wages on public works programs. The policy, if it exists, is a clear standard of general application.

With respect to the challenged department policy which would permit investigators unbridled discretion (1) to select the evidence upon which to rely, and (2) to determine the weight to be given any particular piece of evidence, the requester asserted:

> "[The BOFE investigator] selected any record that could be misconstrued to reflect a labor violation occurred in favor of numerous other records which would indicate no such violation existed. There was no consistent hierarchy of documents. [Citations of examples, omitted.]"[32]

DLSE responded, generally:

> "[T]here is no standard of general application to be followed in public works investigations as to which types of evidence are more reliable than others, and there is no 'hierarchy of evidence.' The facts of each investigation differ with respect to the nature of any issues and their complexity, and it is imperative that the BOFE investigator exercise his or her discretion in weighing any contested evidence and in reaching any conclusions, subject to his or her supervisor's review prior to issuance of

any notice to withhold. Thus, the method by which the audit was conducted does not constitute a regulation. [Citation omitted.]"[33]

Accordingly, DLSE agrees with the requester regarding the lack of consistent standards to be applied regarding the selection or weight of evidence to be used in investigations of suspected prevailing wage violations on public works. No conflict in the evidence exists on this point. It is concluded, therefore, that the selection of evidence and the weight to be assigned to the evidence does not reflect a standard of general application for purposes of application of the APA.

2. Second, has the challenged rule been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?

Having established that the policy, if it exists, of including an additional twenty to twenty-five percent in the amount to be withheld is a policy of general application, OAL must determine if the policy interprets, implements or makes specific a law enforced or administered DLSE. In its response to the request, DLSE argues that the challenged rule does not interpret, implement, or make specific any law, but rather does no more than restate existing law. DLSE contends:

> " . . .there is simply no 'rule, regulation, order or standard of general application'--other than the applicable statutes themselves--governing the calculation of amounts to be withheld pursuant to a notice to withhold, . . . The 'method of calculating suspected wage violations' is specifically set forth by statute, not regulation." [34]

DLSE presented the same argument to the California Supreme Court in 1996 in *Tidewater Marine Western, Inc., v. Bradshaw*[35] the DLSE similarly argued:

> ". . . that the DLSE's interpretation of the IWC [Industrial Welfare Commission] wage orders 'is the only reasonable interpretation,' and therefore it does not constitute a regulation, but rather a direct application of the law. (Citations omitted.)"

The Supreme Court disagreed with DLSE's position, finding that Government Code section 11340.5 clearly makes:

> " . . . the rulemaking procedures of the APA apply to any 'regulation.' and the definition of regulation includes 'every rule . . . adopted . . . to . . .*interpret* . . . the law . . .' (i.e., interpretive regulations). (Gov. Code, section 11342, subd. (g), italics added [by the Supreme Court].)"

In addition, California Court of Appeal cases provide guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA because they merely restate the law. According to *Engelmann v. State Board of Education*, agencies need not adopt as regulations those rules contained in:

> "[a] *statutory scheme* which the Legislature has established. . . ."[36]

> "But to the extent any of the [agency rules] depart from, or *embellish* upon express statutory authorization and language, the [agency] will need to promulgate regulations . . . ." [37] (Emphasis added.)

In the agency response to the request for determination, DLSE argues that the rule at issue here was not "adopted by the agency" because the challenged rule was adopted by the Legislature. In *Grier v. Kizer*[38] the Court of Appeal rejected a similar argument by the Department of Health Services. In that case the Department submitted ". . . there was no need to promulgate a regulation because the only legally tenable interpretation of its statutory auditing authority [was] that statistical sampling and extrapolation procedures must be utilized." The Court rejected that argument by finding that other auditing procedures, although perhaps not as feasible or cost effective, existed. Thus, that method was not the only "*tenable*" interpretation of the statute. (Emphasis in original.)

In 1989,[39] OAL rejected a similar argument, while explaining:

> "In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an enactment is simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative." If, however, the agency makes new law, i.e., supplements or "interprets" a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power."

Citing an earlier OAL Determination, OAL went on to explain:

> "If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."[40] [Emphasis added.]

Stated another way, if the requirements in statute, relevant to the DLSE's policy, can reasonably be read only one way, then those same requirements, if included in DLSE's policy, are no more than restatements of the law. However, the statute includes no reference to augmentation, by twenty to twenty-five percent, of the amount of payment on public works projects to be withheld. Labor Code section 1775 subdivision (a) provides in part:

> "The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workman paid less than the prevailing rates as determined by the director for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the prevailing wage shall be paid to each workman by the contractor . . . ."[41]

In the present case, the requester has presented evidence in the form of the BOFE investigator's sworn testimony, that DLSE had a policy, an unwritten rule, that in cases where a notice to withhold is to be issued, a twenty to twenty-five percent increase in the amount to be withheld is added to the total. However, DLSE contests the existence of such a rule. OAL does not decide the question whether such a rule existed at DLSE. However, if it did exist, the policy would not constitute a mere restatement of the statute. Nowhere in the statute is such an increase authorized. Thus, such a policy, or unwritten rule, would constitute an *interpretation* of the statute within the meaning of Government Code section 11342, subdivision (g).

Accordingly, if the challenged policy existed at the DLSE, then it satisfied the second part of the two part test, in that it was adopted to implement, interpret, or make specific the law enforced by the DLSE. The challenged policy would constitute a regulation within the meaning of the APA.

C. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED *GENERAL* EXCEPTION TO APA REQUIREMENTS?

All "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute,[42] as discussed above, or unless the conditions of a general exception are met. DLSE does not rely on any exception to the application of the APA. Nor does OAL find that any exception applies in this case.

III. CONCLUSION

For the reasons set forth above, OAL finds that:[43],[44]

(1) The DLSE is generally subject to the APA and its rules must be adopted pursuant to the Administrative Procedure Act;

(2) The selection of evidence and the weight to be assigned to the evidence during a BOFE investigation does not reflect a standard of general application for purposes of application of the APA .

(3) The challenged rule of procedure that adds twenty to twenty-five percent to the amount to be withheld in a notice to withhold, if it exists, constitutes a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g);

(4) That "regulation," if it exists, violates Government Code section 11340.5, subdivision (a), and, therefore is invalid and unenforceable.

DATE: November 25, 1998

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ENDNOTES

1. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
>
> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)--yet had not been adopted pursuant to the APA, was "*invalid*"). OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from Grier v. Kizer.

OAL discusses the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

2. This determination may be cited as "**1998 OAL Determination No. 39**."

3. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and* Chapter *5* (commencing with Section 11500) *constitute,* and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

4. Labor Code section 1720 explains that "public works" include work done under contract paid for in whole or in part by public funds, work done for irrigation, utility, reclamation, and improvement districts, and street or sewer improvement work done under state authority. Construction work done pursuant to private contract which meets specified conditions, also constitutes "public works." (Labor Code section 1720.2.)

   Prevailing wage laws require the contracting public entity to notify the contractor of the applicability of prevailing wage requirements and the possibility of penalties and forfeitures in the event of noncompliance, either through specifications in the notice for bids or by stipulations in any resulting contract. (Labor Code sections 1773.2, 1775, 1776, subdivision (g) and 1777.5.)

5. Labor Code sections 1773.2 and 1775.

6. Labor Code section 1771.5, 1775, 1776, and 1777.

7. Statutes 1976, chapter 746, sections 16 and 17.

8. Labor Code sections 21; 79; 82, subdivision (b); and 83, subdivision (b).

9. Labor Code section 61.

10. Labor Code section 96.

11. Labor Code section 90.5, subdivision (b), provides in part:

    "In order to ensure minimum labor standards are adequately enforced, the Labor Commissioner shall establish and maintain a field enforcement unit, which . . . shall have primary responsibility for administering and enforcing those statutes and regulations most effectively enforced through field investigations, including Sections . . .1771, 1776, 1777.5, . . ."

    Labor Code section 90.5, subdivision (c) provides in part: "The Labor Commissioner

shall adopt an enforcement plan for the field enforcement unit."

Labor Code section 98.8 provides: "[t]he Labor Commissioner *shall promulgate all regulations and rules of practice and procedure* necessary to carry out the provisions of this chapter." [Emphasis added.]

12. Labor Code section 51.

13. Labor Code section 54.

14. Request for Regulatory Determination, page 4.

15. Agency Response, page 2, footnote 2.

16. California Regulatory Notice Register ("CRNR") 98, No.35-Z, August 28, 1998, p. 1670.

17. Government Code section 11342, subdivision (a).

18. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

19. See endnote 11.

20. Labor Code section 98.8 provides: "The Labor Commissioner shall promulgate all regulations and rules of practice and procedure necessary to carry out the provisions of this chapter."

21. *Tidewater Marine Western, Inc., v. Bradshaw* (1996) 14 Cal.4th 557, 570; 59 Cal.Rptr.2d 186, 193.

22. The Supreme Court reasoned as follows in *Tidewater Marine Western, Inc., v. Bradshaw* (supra) 14 Cal.4th 557, 569; 59 Cal.Rptr.2d 186, 193:

> "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation (citations omitted), as well as notice of the law's requirements so that they can conform their conduct accordingly (citations omitted). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of the agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (Citations omitted.)"

23. *Id.*

24. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251 (see endnote 3: *Grier*, disapproved in part on other grounds in *Tidewater*).

25. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.) (*Grier, disapproved in part on other grounds in Tidewater).*

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

26. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253 (see endnote 3: *Grier*, disapproved in part on other grounds in *Tidewater*).

27. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.

28. *Id.*, at 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.

29. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

30. Please see the reporter's transcript of the deposition attached to the request for regulatory determination.

31. Agency Response, dated October 22, 1998, page 3.

32. Request for regulatory determination, dated June 1, 1993, page 2.

33. Agency Response, dated October 22, 1998, page 4, citing *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345.

34. In its response, DLSE relies upon Labor Code section 1775, subdivision (a) which provides in part: "The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor . . ." DLSE continues: "[t]hus there can be no 'method' other than that prescribed by statute, a simple mathematical calculation." (Agency Response, dated October 22, 1998, page 3.)

35. *Tidewater Marine Western, Inc., v. Bradshaw* (1996) 14 Cal.4th 557, 573; 59 Cal.Rptr.2d 186, 196.

36. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274

37. *Id.,* 275.

38. *Id.*, at 436; 268 Cal.Rptr., at 254.

39. 1989 OAL Determination No. 15 [Docket No. 89-002] Oct. 10, 1989, CRNR, 89, No. 42-Z, p. 3031, typewritten version, p. 506..

40. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

41. Labor Code section 1775, subdivision (a) was amended in 1997. In general terms the amendment increases the daily penalty from twenty-five ($25) to fifty ($50). In addition, it provides the Labor Commissioner discretion as to the penalty to be imposed in ". . . consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor . ."

42. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

    c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

    f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88

Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

43. Government Code section 11340.5, subdivision (d) provides that:

> "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published."

44. Pursuant to Title 1, CCR, section 127, this determination shall become effective on the 30th day after filing with the Secretary of State. This determination was filed with the Secretary of State on the date shown on the first page of this determination.